PASUKHAS CONSTRUCTION SDN BHD & ANOR A

v.

MTM MILLENIUM HOLDINGS SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
HISHAMUDIN MOHD YUNUS J
[ORIGINATING SUMMONS NO: D1-24-366-2007]
10 FEBRUARY 2009

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Interlocutory injunction to restrain call on performance bond - Principles applicable - Whether the fraud or unconscionability principles applicable - Whether the American Cynamid principles applicable* C

CIVIL PROCEDURE: *Judicial precedent - Court of Appeal of Singapore, decisions by - Whether merely persuasive - Whether Supreme Court of Malaysia decision binding on High Court of Malaya - Court of Appeal of Malaysia decision inconsistent with Supreme Court of Malaysia decision - Whether High Court of Malaya ought to reject inconsistent Court of Appeal of Malaysia decision - Whether High Court of Malaya bound to follow Supreme Court of Malaysia decision* D E

CIVIL PROCEDURE: *Parties - Proper parties to be sued, whether - Allegation of fraudulent or unconscionable conduct against first defendant - Nothing to suggest that second defendant had notice of any fraudulent or unconscionable conduct by the first defendant - Whether second defendant ought not to have been sued* F

CONTRACT: *Performance bond - Injunction against call on performance bond - Principles applicable - Whether the fraud or unconscionability principles applicable - Whether the American Cynamid principles applicable* G

The plaintiffs applied for an interlocutory injunction to restrain the first defendant from calling on a performance bond issued by the second defendant. The plaintiffs also applied to restrain the second defendant from making any payment to the first defendant under the bond. Counsel for the plaintiffs submitted that the principle to be applied in determining whether an interlocutory injunction ought to be granted was either the fraud principle or the unconscionability principle. In the instant case, counsel argued that the unconscionability principle applied since it was unconscionable for the first defendant to call on the bond. H I

Held (dismissing the application with costs):

(1) The second defendant ought not to have been made a party to the action since the plaintiff's allegation of unconscionable conduct was made against the first defendant. There was nothing to suggest that the second defendant had notice of any fraudulent conduct on the part of the first defendant. *Edward Owen Engineering v. Barclays Bank International* (foll); *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* (refd); *LEC Contractors (M) Sdn Bhd v. Castle Inn Sdn Bhd & Anor* (refd). (paras 10 & 11)

(2) The principle applicable in the instant case was as laid down by the Supreme Court in *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd*, namely the *American Cynamid* principles. In the instant case, the plaintiffs had failed to satisfy the court that their case satisfied the *American Cynamid* principles. *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* (foll); *American Cynamid v. Ethicon* (foll). (paras 14 & 15)

(3) Although the Court of Appeal in *LEC Contractors (M) Sdn Bhd v. Castle Inn Sdn Bhd & Anor* had applied the fraud principle and rejected the *American Cynamid* principles and the unconscionable conduct principle, that ruling by the Court of Appeal was not consistent with the ruling of the Supreme Court in *Esso Petroleum*. In the instant case, the High Court, faced with two inconsistent appellate rulings, was bound to follow the decision of the Supreme Court in *Esso Petroleum* since it was a ruling of the apex court. (paras 16, 17, 18 & 19)

(4) In view of the local cases of *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* and *LEC Contractors (M) Sdn Bhd v. Castle Inn Sdn Bhd & Anor* the High Court was not at liberty to apply the unconscionability principle as propounded by the Singapore Court of Appeal case of *Bocotra Construction* – although some local High Court decisions have applied that principle. *Bocotra Construction* was a persuasive authority. The High Court was bound by the doctrine of binding precedent. (para 21)

Case(s) referred to:

American Cynamid v. Ethicon [1975] 1 AC 396 ***(foll)***

Bains Harding (Malaysia) Sdn Bhd v. Arab-Malaysia Merchant Bank Bhd & 3 Ors [1996] 1 BLJ 25 HC ***(refd)***

Bocotra Construction Pte Ltd v. AG (No 2) [1995] 2 SLR 733 ***(refd)***

Edward Owen Engineering Ltd v. Barclays Bank International Ltd and Utama Bank [1978] 1 AER 976 ***(refd)***

Elcorp Resources Sdn Bhd & Anor v. Perbadanan Putrajaya & Anor [1999] 1 CLJ 588 HC ***(refd)***

Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd [1995] 1 CLJ 283 SC ***(refd)***

GHL Pte Ltd v. Unitrack Building Construction Pte Ltd & Anor [1999] 4 SLR 604 ***(refd)***

Kirames Sdn Bhd v. Federal Land Development Authority [1991] 2 CLJ 1366; [1991] 3 CLJ (Rep) 27 HC ***(refd)***

LEC Contractors (M) Sdn Bhd v. Castle Inn Sdn Bhd & Anor [2000] 3 CLJ 473 CA ***(refd)***

Malaysia Overseas Investment Corporation Sdn Bhd v. Sri Segambut Supermarket Sdn Bhd [1985] 1 LNS 156 HC ***(refd)***

Min Thai Holdings Pte Ltd v. Sunlabel Pte Ltd & Anor [1999] 2 SLR 368 ***(refd)***

Nafas Abadi Holdings Sdn Bhd v. Putrajaya Holdings Sdn Bhd [2004] 1 LNS 127 ***(refd)***

Perkasa Duta Sdn Bhd v. Perbadanan Kemajuan Negeri Selangor [2002] 2 CLJ 307 HC ***(refd)***

Potton Homes Ltd v. Coleman Contractors Ltd [1984] 28 Build LR 19 ***(refd)***

Samwoh Asphalt Premix Pte Ltd v. Sum Cheong Piling Pte Ltd & Anor [2002] 1 SLR 1 ***(refd)***

The Radio & General Trading Co Sdn Bhd v. Wayss & Freytag (M) Sdn Bhd [1997] 1 LNS 400 ***(refd)***

TTI Team Telecom International Ltd and another v. Hutchinson 3G UK Ltd [2003] 1 All ER (Comm) 914 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 29

For the plaintiffs - Gideon Tan (Vincent Tan & Cliff Siow with him); M/s Gideon Tan Razaki Zaini

For the 1st defendant - K Nayagam (Shannon Rajan with him); M/s Skrine

For the 2nd defendant - Lydia Lee; M/s Raja Darryl & Loh

Reported by Andrew Christopher Simon

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JUDGMENT

Hishamudin Mohd Yunus J:

[1] Enclosure 3 is an interlocutory application by the plaintiffs/ applicants for an interlocutory injunction pursuant to O. 29 of the Rules of the High Court 1980 to restrain the first defendant from demanding for payment from the second defendant and/or receiving payment of the sum of RM1,462,500 or any sum whatsoever under an Insurance Guarantee for Performance Bond issued by the second defendant, Lonpac Insurance Berhad, for the benefit of the first defendant. The plaintiffs are also seeking an interlocutory injunction against the second defendant to restrain the latter from making payment to the first defendant.

[2] I have dismissed the application with costs, and I shall now state my reasons.

[3] I shall begin by setting out briefly the background facts and the basic issues.

[4] Pursuant to a letter of acceptance dated 27 August 2007 issued by the first defendant to the plaintiffs, the plaintiffs were awarded a construction contract at an agreed total contract sum of RM29,250,000. Upon the award of the construction contract, the plaintiffs provided the first defendant with an on demand performance bond to secure the performance of the contract by the plaintiffs. Subsequently, the parties agreed to reduce the contract sum to RM28,500,000. The plaintiffs submitted their first certified progress claim on 8 October 2007. The claim was certified by the architect/superintending officer and supported by the interim valuation signed by the first defendant's quantity surveyor. However, on 14 November 2007, the architect/ superintending officer wrote to the plaintiffs informing the latter that an item in the contract known as 'preliminaries' had been reduced from RM2,384,746 to RM650,000; and instructed the plaintiffs to resubmit the first progress claim. The plaintiffs protested: they wrote back on 19 November 2007 to the architect and the defendant stating that they were not agreeable to a reduction of the contract sum, which from the plaintiffs' standpoint was done unilaterally; and requested the first defendant to honour the first progress claim. The first defendant on their part averred that they had never agreed to a sum of RM2,384,746 for preliminaries. At this juncture, the architect by a letter dated

15 November 2007 alleged that the plaintiffs had stopped work on 10 November 2007. This allegation was also disputed by the plaintiffs. By reason of the alleged unilateral reduction of preliminaries, the alleged refusal on the part of the first defendant to honour the first certificate and the allegation about them having stopped work, the plaintiffs terminated the contract. The defendant, in turn, called on the performance bond.

[5] The learned counsel for the plaintiffs, Encik Gideon Tan, submits that the principle to be applied in determining as to whether or not an interlocutory injunction ought to be granted so as to restrain the defendants from enforcing the performance bond is either the fraud principle or the unconscionability principle.

[6] It is the submission of Encik Gideon Tan that the fraud principle was applied in the following cases:

(1) *Edward Owen Engineering Ltd v. Barclays Bank International Ltd and Utama Bank* [1978] 1 All ER 976;

(2) *Malaysia Overseas Investment Corporation Sdn Bhd v. Sri Segambut Supermarket Sdn Bhd* [1985] 1 LNS 156;

(3) *Patel Holdings Sdn Bhd v. Estet Pekebun Kecil & Anor* [1989];

(4) *Kirames Sdn Bhd v. Federal Land Development Authority* [1991] 2 CLJ 1366; [1991] 3 CLJ (Rep) 27; and

(5) *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* [1995] 1 CLJ 283.

[7] And it is the submission of the learned counsel for the plaintiffs that the unconscionability principle was applied in the following cases:

(1) *Potton Homes Ltd v. Coleman Contractors Ltd* [1984] 28 Build LR 19;

(2) *Bocotra Construction Pte Ltd v. AG (No: 2)* [1995] 2 SLR 733.

(3) *The Radio & General Trading Co Sdn Bhd v. Wayss & Freytag (M) Sdn Bhd* [1997] 1 LNS 400;

(4) *TTI Team Telecom International Ltd and another v. Hutchinson 3G UK Ltd* [2003] 1 All ER (Comm.) 914;

(5) *GHL Pte Ltd v. Unitrack Building Construction Pte Ltd & Anor* [1999] 4 SLR 604;

A (6) *Samwoh Asphalt Premix Pte Ltd v. Sum Cheong Piling Pte Ltd & Anor* [2002] 1 SLR 1;

(7) *Elcorp Resources Sdn Bhd & Anor v. Perbadanan Putrajaya & Anor* [1999] 1 CLJ 588;

B (8) *Min Thai Holdings Pte Ltd v. Sunlabel Pte Ltd & Anor* [1999] 2 SLR 368;

(9) *Bains Harding (Malaysia) Sdn Bhd v. Arab-Malaysia Merchant Bank Bhd & 3 Ors* [1996] 1 BLJ 25;

C (10) *Perkasa Duta Sdn Bhd v. Perbadanan Kemajuan Negeri Selangor* [2002] 2 CLJ 307; and

(11) The unreported case of *Nafas Abadi Holdings Sdn Bhd v. Putrajaya Holdings Sdn Bhd* [2004] 1 LNS 127.

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[8] In the present case, the plaintiffs are only relying on the unconscionability principle. The plaintiffs contend that the conduct of the first defendant in calling on the bond is unconscionable. I do, however, observe from Encik Gideon's written submission that E there is a mild allegation of fraud on the part of the first defendant; but this is an issue which is not seriously pursued by him (clearly not in his oral submission). Hence, I do not propose to touch on the allegation of fraud.

F **[9]** In the Singapore Court of Appeal case of *Bocotra Construction* (a decision which Encik Gideon relies on) the court held:

> In our opinion, whether there is fraud or unconscionability is the sole consideration in applications for injunctions restraining payment or calls on bonds to be granted. Once this can be G established, there is no necessity to expend energies in addressing the superflous question of 'balance of convenience'. It does not lie in the mouth of the defendant to claim that damages would still somehow be an adequate remedy.

H **[10]** At the outset I will first deal with the second defendant. I am in agreement with Cik Lydia Lee, the learned counsel for the second defendant (Encik K. Nayagam, the learned counsel for the first defendant shares the same view), that the second defendant ought not to have been made a party to the action in the first I place since (as we shall soon observe) the plaintiffs' allegation of unconscionable conduct is only made against the first defendant.

In this regard I only need to remind myself of what Lord Denning MR said in *Edward Owen Engineering v. Barclays Bank International* (at p. 983):

> A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice.

[11] The above principle has been adopted by our courts in *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* [1995] 1 CLJ 283 and *LEC Contractors (M) Sdn Bhd v. Castle Inn Sdn Bhd & Anor* [2000] 3 CLJ 473.

[12] Needless to say, it is not suggested in the present case by the plaintiffs that the second defendant has notice of any fraudulent conduct on the part of the first defendant in its contractual relation with the plaintiffs.

[13] In passing it is also pertinent to note that in *Bocotra* the court also held that:

> ... there is no distinction between the principles to be applied in cases dealing with attempts to restrain banks from making payment or those dealing with restraint of callers from calling for payment. This principle has been consistently endorsed in the English authorities, right up to recent cases such as *Deutsche Ruckversicherung AG v. Walbrook Insurance Co* [1994] 4 All ER 181.

[14] Now, as regards the first defendant, in my view – and I am inclined to agree with the submission of Encik K. Nayagam, the learned counsel for the first defendant – the principle that is applicable is as laid down by the Supreme Court in *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* [1995] 1 CLJ 283, and that is the *American Cynamid* principles (see *American Cynamid v. Ethicon* [1975] 1 AC 396). In *Esso Petroleum Malaysia Inc*, Peh Swee Chin SCJ, in delivering the judgment of the Supreme Court, said (at p. 291):

A Learned counsel for the appellant was at some pains to impress on us that the injunction should not have been granted by the lower court in the first place to restrain the buyer from receiving any sum of money under the two performance bonds in question on the ground that *American Cyanamid v. Ethicon* [1975] AC 396; [1975] 2 WLR 316 had no application in a situation of restraint of payment on a bank guarantee.

While agreeing that the interlocutory *ex parte* injunction granted herein in the circumstances of this instant appeal should have been discharged by the learned judge, to say that *American Cyanamid* could not be considered in exercising any discretion in granting or withholding such an interlocutory injunction in regard to a bank guarantee was wide off the mark. Except in the case of a few exceptions which did not apply to the instant appeal, *American Cyanamid* would apply to all interlocutory injunctions.

[15] In the present case, I do not propose to go into detail on the affidavit evidence relied upon by the plaintiffs in order to show that the conduct of the first defendant is unconscionable. For, even if the plaintiffs were to succeed in convincing me that the conduct of the first defendant was *prima facie* unconscionable, it still gets the plaintiffs nowhere as they have applied the wrong principle, the unconscionability principle. What the plaintiffs ought to have done – but have failed to do so – is to impress the court that their case satisfies the *American Cynamid* principles.

[16] It is, however, true that the Court of Appeal, five years later (after the Supreme Court's decision in *Esso Petroleum Malaysia Inc*) in *LEC Contractors (M) Sdn Bhd v. Castle Inn Sdn Bhd & Anor* [2000] 3 CLJ 473 (this case was also brought to my attention by Encik K. Nayagam), applied the fraud principle and rejected the *American Cyanamid* principles and the unconscionable conduct principle. The court said (at p. 499):

First of all we wish to point out that the authorities we have referred above clearly indicated that in order to justify any injunction to stop payment there must be clear evidence of fraud on the part of the first defendant which comes to the knowledge of the second defendant. Bad faith or unconscionable conduct by itself is not fraud.

[17] However, in my view, this ruling by the Court of Appeal is not consistent with the ruling of the Supreme Court in *Esso Petroleum Malaysia Inc*, that I have referred to earlier, although, interestingly, *Esso Petroleum Malaysia Inc* was in fact mentioned by the Court of Appeal in its judgment. Without mentioning that it disagreed with the decision of the Supreme Court in *Esso Petroleum Malaysia Inc*, the Court of Appeal said:

> The final point raised by counsel for the plaintiff is justice of the case. It was submitted that the *status quo* ought to be maintained to preserve the subject matter and substratum of the suit pending the disposal of the suit in respect of the underlying contract either through trial or arbitration. Counsel for the plaintiff contended that if the injunction is not granted, the bank will make the payment which will alter the *status quo*, which will cause irreparable prejudice and damages to the plaintiff. It was further contended that any prejudice to the first defendant could easily be compensated by payment of interest.
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> In our view 'justice of the case' is what the first defendant called 'the balance of convenience test'. This principle was propounded in the *American Cyanamid* case. It was contended by the first defendant that the test is not applicable to an on demand performance bond. This was decided by the Court of Appeal in Singapore in *Bocotra Construction Pte Ltd v. Attorney General (No: 2)* [1995] 2 SLR 733 where it was held that the balance of convenience test propounded in the *American Cyanamid* case is not applicable to an irrevocable letter of credit. Since an on demand performance bond is of the same status as irrevicable letters of credit that case applies in the present appeal.

[18] Indeed, in its judgment the Court of Appeal did not allude to the passages in Peh Swee Chin SCJ's judgment in *Esso Petroleum Malaysia Inc* that I have referred to in the earlier part of my judment.

[19] With respect to the Court of Appeal, on my part, faced with the two inconsistent rulings, I am, needless to say, bound by the decision of the Supreme Court in *Esso Petroleum Malaysia Inc* the latter being the apex Court.

[20] It is to be observed that although our Court of Appeal in its judgment referred to *Bocotra Construction* it, however, did not adopt the unconscionability principle although the unconscionability argument was also advanced before the court. It only adopted the

A fraud principle. In fact, the Court of Appeal in its judgment never at all alluded to the passage in the judgement of the Singapore Court of Appeal in *Bocotra* that I have referred to earlier.

[21] In the light of *Esso Petroleum Malaysia Inc* and *LEC*
B *Contractors* I am not at liberty to apply the unconscionability principle as propounded by the Singapore Court of Appeal case of *Bocotra Construction* – although some of our High Court decisions that I have mentioned above have applied that principle. *Bocotra Construction*, being a decision of the Court of Appeal of Singapore,
C is a persuasive authority; and the principle of unconscionability that it enunciated appears to me to be a sound principle. But, regretably, I am bound by the doctrine of binding precedents. I am bound by the decision of the Supreme Court in *Esso Petroleum Malaysia Inc* (which applied the *American Cyanamid* principles) or,
D alternatively, by the decision of the Court of Appeal in *LEC Contractors* (which applied the fraud test).

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